MOTION FILED

MAR 3 1 2003

No. 02-1507

(4)

In the

Supreme Court of the United States

HENRY TORROMEO and MDR CORPORATION,

Petitioners,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Hampshire

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS HENRY TORROMEO AND MDR CORPORATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37(b), Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioners Harry Torromeo and MDR Corporation.[1] Written consent for amicus participation in this case was granted by counsel of record for Petitioners. Consent was withheld by Respondent Town of Fremont.

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, public interest law foundation of its kind in America. For 30 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also participated as amicus curiae in nearly every major real property takings case heard by this Court in the last two decades, including the recent case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

PLF believes that its litigation experience will provide an additional, valuable viewpoint on the issues presented in this case. Specifically, PLF seeks to augment the arguments of the Petitioners by providing additional background on the jurisprudential framework in which this case arises. PLF's

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[1] In accordance with Rule 37.6, Amicus Curiae confirms that this brief was not written by counsel for any party in this matter and that no person or entity made a monetary contribution specifically for the preparation of this brief.

amicus brief directs this Court to lower court decisions, not cited by Petitioners, that are in conflict with each other and with the decision by the New Hampshire Supreme Court.

For these reasons, the motion of Pacific Legal Foundation to file a brief amicus curiae should be granted.

DATED: May, 2003.

Respectfully submitted,

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QUESTION PRESENTED

Where Petitioner successfully argued that the application of a land use restriction to his property was "invalid ab initio," did the New Hampshire Supreme Court err in holding that Petitioner was not entitled to just compensation for the period during which the restriction barred otherwise permissible development?

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INTRODUCTION

Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the petition for certiorari filed by Petitioner Henry Torromeo and MDR Corporation on April 14, 2003.

When a land use restriction is found to be invalid at inception, some lower courts have concluded that invalidation is the only relief available to the aggrieved property owner. These courts are split, however, on the rationale for denying compensation. Other courts have gone in the opposite direction, reasoning that compensation is required when a land use restriction is invalidated. Given the confusion below, this Court should grant the petition to clarify the circumstances under which an invalidated regulation will trigger the just compensation remedy of the Fifth Amendment.

ARGUMENT

THE DECISION BELOW HIGHLIGHTS A TREND THAT DRASTICALLY LIMITS THE REACH OF THE JUST COMPENSATION REMEDY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF LOWER FEDERAL AND STATE COURTS

State court decisions that refuse, like the decision below, to grant compensation for an illegal land use restriction have done so on two grounds. First, when faced with a claim that an invalid regulatory decision has caused a compensable taking by temporarily preventing all property use, a few decisions deny compensation on the ground that a statutorily-based "mistake" in application cannot give rise to a damages remedy. *See Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188, 1203 (Cal. 1998) (concluding that "a judicial determination of the validity of certain *preconditions to*

development is a normal part of the development process," and thus could not give rise to a right to a claim for compensation even when the "precondition" was invalid and denied all use during the judicial proceedings); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1275 (Mass. 1992) ("plaintiffs make no reasoned argument that, simply because a municipal regulation is not authorized by law, there is a compensable temporary taking . . . even though the regulation restricts the sale and reduces the market value of the property until the regulation is successfully challenged in court").

But when the claim rests purely on the allegation that application of the regulation was invalid and/or did not substantially advance a legitimate interest, other courts have held that compensation is available only where a regulation prevents all use of property. *Sea Cabins on Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595, 604 (S.C. 2001) (stating that while a landowner "who successfully challenges the applicability of a governmental regulation is likely to have suffered some temporary harm during the process, the harm does not give rise to a constitutional taking"); *Miller and Son Paving, Inc. v. Plumstead Township*, 717 A.2d 483, 486 (Pa. 1998) (holding that an invalid regulation did not give rise to a temporary taking because it did not deny all use of property); *Chioffi v. City of Winooski*, 676 A.2d 786, 790 (Vt. 1996) (improper denial of variance did not cause a taking because compensation remedy reserved for denials of all use).

The decision of the New Hampshire Supreme Court adopts both of these rationales: it effectively holds that the compensation remedy *does not* apply if (1) any viable use of property remains; or (2) application of the restrictive regulation was an "erroneous" means to achieve a legitimate end. *See* Petitioner's Appendix (Pet. App.) at 1-3. Put in the affirmative, this means that compensation is due only when a regulation is valid *and* denies all use. *Id.*

Such a ruling puts a large class of regulatory land use restrictions beyond the reach of the Just Compensation Clause. In particular, it makes no room for compensation when a land use decision is such an unreasonable means of achieving a goal that it fails to substantially advance legitimate state interests. *Cf. Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 334 (2002) (noting that a landowner could argue for compensation on the ground that a temporary regulation was applied in bad faith or "did not substantially advance a legitimate state interest"). More generally, the decision below logically bars compensation whenever a land use restriction is illegally applied, regardless of its impact on the owner.

This ruling undermines the rule of law in the land use context because invalidation is simply not a strong enough consequence to deter excessive interference with private property. During the effective period of the regulation and litigation to have it reversed, the subject land will remain idle, as the government desires. If the government's actions are eventually struck down, it can simply start over, without any real liability. Given the highly discretionary nature of land use decision-making, it is inevitable that some regulators will take advantage of this situation. This is exactly the problem that this Court sought to rectify by mandating compensation as the constitutional remedy for all invalid land use restrictions that rise to a taking. *See, e.g., San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 655 n.21 (1981) (Brennan, J., dissenting).

In light of the practical problems associated with the invalidation remedy, it is not surprising that several important federal and state decisions stand in opposition to the decision below. Among these are *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 (11th Cir. 1987), *Nemmers v. City of Dubuque*, 716 F.2d 1194, 1197-1200 (8th Cir. 1983), and

Whitehead Oil Company v. City of Lincoln, 515 N.W.2d 401, 407-08 (Neb. 1994).

In *Wheeler*, the city passed an ordinance that "outlawed construction of apartment complexes" throughout the city, including on plaintiff's land. *Wheeler*, 833 F.2d at 268. The district court found, and a panel of the Fifth Circuit subsequently agreed, that the city's actions "bore no substantial relationship to any legitimate police power interest." *Id.* The case was subsequently remanded to the district court for a determination of damages, but eventually returned to the newly-created Eleventh Circuit after the district court failed to properly calculate compensation for the period during which the invalidated ordinance was in effect. *Id.* at 269. At that point, the court of appeals reiterated that "the plaintiffs were entitled to compensation for the injury they sustained as a result of the temporary taking." *Id.* at 270. The court pointed to *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), as vindicating its earlier conclusion that compensation was required for the effective period of the irrational ordinance. *Id.*

In *Nemmers v. City of Dubuque*, the Eighth Circuit concluded that private property had been downzoned to agricultural use in violation of Iowa's vested rights law. 716 F.2d at 1197-1200. The court subsequently held that the aggrieved landowner was entitled to damages, under the United States Constitution, for the period during which the illegal zoning was in effect. 764 F.2d 502, 504-06 (8th Cir. 1985).

At the state level, the Nebraska Supreme Court made clear in *Whitehead Oil* that an arbitrary land use regulation will trigger compensation for its effective period. In *Whitehead Oil*, the landowner successfully challenged the validity of a zoning ordinance that limited its property to office uses. 515 N.W.2d at 400. The trial court then awarded damages for the five year period of litigation during which the ordinance remained in

effect. *Id.* at 400, 404-05. On appeal to the state supreme court, the city argued that there could be no compensable temporary taking under these circumstances and, thus, the damages were in error. *Id.* at 407. The Nebraska Supreme Court rejected this contention, concluding that the temporary takings doctrine established in *First English* was applicable to regulatory action that denied less than all use and, in particular, to cases where the regulation was invalid:

> Our determination . . . that in changing the applicable zoning designation the city acted not in furtherance of a legitimate state interest but arbitrarily and capriciously so as to deny Whitehead Oil a use permit, compels our agreement with the district court's ruling that Whitehead Oil's property has been subjected to a taking under the federal Constitution.

Id. at 408. It therefore upheld a damage award for the period during which the invalid zoning was in effect, calculated as the difference between the fair market value of the property as it existed under zoning allowing development of a convenience store and its value under the subsequent irrational zoning scheme. *Id.* at 411-12.

The decision of the New Hampshire Supreme Court is difficult to reconcile with the reasoning of the foregoing federal and state decisions. Unlike the decision below, these cases acknowledge the compensatory remedy is a general remedy not dependent on a denial of all use of property or the statutory "validity" of an ordinance at the time of enactment. *See, e.g.*, *Whitehead Oil*, 515 N.W.2d at 411. In contrast, the court below establishes compensation as the constitutional exception, one that is to be applied solely in the rare cases where government is foolish enough to impose the most draconian use restriction in an unreasonable manner. *See* (Pet. App.) at 1-3.

The manifest conflict between the decision below and the decisions of other state and federal courts warrants a grant of review under Rules 10(b) and 10(c).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: May, 2003.

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